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In the Supreme Court of the United States

OCTOBER TERM, 1975

WANDA JUNE WEEKS, ET AL., APPELLANTS

v.

THOMAS J. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, Thomas J. Kleppe, Secretary of the Interior, moves that the judgment of the district court be affirmed insofar as it holds that the Act of September 21, 1968, 82 Stat. 861 *et seq.*, 25 U.S.C. 1181-1186, and the Act of October 3, 1972, 86 Stat. 762 *et seq.*, 25 U.S.C. (Supp. IV) 1291-1297, are constitutional.[1]

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[1]The Secretary has sought review in No. 75-1495 of that portion of the district court's judgment holding 25 U.S.C. (Supp. IV) 1291-1297 invalid. See n. 3, *infra*.

STATEMENT

This is a direct appeal from those portions of the final judgment of a three-judge district court that upheld the constitutionality of 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297 (J.S. App. 1-4). These statutes appropriate funds to satisfy judgments of the Indian Claims Commission that compensate the Delaware Tribe of Indians for wrongs done to the tribe by the United States in 1818 and 1856-1857.

1. The Delaware Indians originally lived on the east coast of what is now the United States but, by the second decade of the 19th century, they were geographically scattered. Although the main branch of the tribe lived in Indiana and Ohio, some members (the Munsee Indians) resided in New York and Canada, while others lived on a tract of land in Missouri that had been granted by Spain in 1793, and still others were located in Texas, Arkansas, and Oklahoma. In the Treaty of St. Mary's in 1818, 7 Stat. 188, the Delawares ceded their lands in Indiana to the United States in return for a promise of land west of the Mississippi River. The Delawares then moved to the Missouri tract, where they remained until 1829 (J.S. App. 11-12).

In September 1829, the Delawares signed another treaty with the United States, supplementing the 1818 treaty, in which they agreed to give up their temporary residence in Missouri and to move to a permanent residence in Kansas. 7 Stat. 327. These Kansas lands purported to satisfy the federal government's obligation under the 1818 treaty to provide the Delawares with a home west of the Mississippi. Although most of the Delawares moved to the land assigned them in Kansas, a substantial group (the Absentee Delawares) settled in Oklahoma, where they have maintained their tribal identity, with chiefs and a

tribal council, to the present day (J.S. App. 12). The Absentee Delawares constitute a federally-recognized tribe.

In 1854, the nucleus of the Delaware Tribe, then living in Kansas, entered into a treaty with the United States in which they ceded most of their lands to the federal government. 10 Stat. 1048. Part of this territory was reserved for the Delawares as a permanent home (the "diminished reserve"), while the bulk of the remainder (the "trust lands") was to be sold by the government at public auction with the proceeds going to the Delaware general tribal fund. In 1856 and 1857, however, the United States violated the terms of the treaty by improperly selling the trust lands without a public auction. As a result, the Delawares received far less money from the disposition than they should have obtained (J.S. App. 13).

In 1860, the United States agreed by treaty to survey the diminished reserve and to grant each Delaware Indian (including women and children) an 80-acre tract of land with restricted title. 12 Stat. 1129. As to the Absentee Delawares, Article IV of the treaty expressly provided (12 Stat. 1130-1131):

> Whereas some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation * * * .

Finally, in 1866, the Delawares entered into another treaty with the United States in which they agreed to move to Indian Country in Oklahoma. 14 Stat. 793.

Under the treaty, the diminshed reserve was to be sold and the proceeds used to buy 160-acre tracts of land in Oklahoma for each tribal member. In addition, all adult Delawares were to be given the opportunity either to remove to Oklahoma with the tribe or, instead, to dissolve all tribal relations and to become citizens of the United States. Each Delaware who chose to leave the tribe was to receive fee simple title to an 80-acre plot in the reserved Kansas lands and his *pro rata* portion of the tribal assets (J.S. App. 14). The treaty further provided that Indians electing to become citizens of the United States "shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities." 14 Stat. 796. Appellants, the so-called "Kansas 'Delawares'," are the descendants of those Indians who severed all relations with the Delaware Tribe in 1866, received their proportionate share of the tribal assets, and remained in Kansas as American citizens (J.S. App. 15).[2]

By 1867 most of the Delawares had moved to Oklahoma, where they each received a life estate of 160 acres of land on the Cherokee reservation. Although these Indians became members and citizens of the Cherokee nation, they retained a group identity as Delawares (J.S. App. 15-16). Their descendants are the Cherokee Delawares, a federally-recognized tribe.

2. In 1951, members of the Absentee Delawares filed suit in the Indian Claims Commission on behalf of the

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[2]A total of 21 adults and 49 minors remained in Kansas. The minors did not formally become citizens of the United States until 1874, when Congress appropriated funds to pay them a proportionate share of the assets of the Delaware Tribe and directed the Secretary of the Interior to issue fee simple title to lands allocated to them in the 1866 treaty (J.S. App. 16-17). 18 Stat. 146, 175.

Delaware Nation to challenge as inadequate the compensation received under the 1818 treaty. The Commission found that the value of the Indiana lands ceded to the United States in 1818 was greatly in excess of the value of the Kansas lands received by the Delawares in return in 1829, and awarded $1,627,244.64 to the Delaware Nation (J.S. App. 17). By Act of September 21, 1968, 82 Stat. 861 *et seq.*, 25 U.S.C. 1181-1186, Congress appropriated funds to satisfy this judgment and ordered the Secretary of the Interior to distribute the funds to the following (25 U.S.C. 1181; J.S. App. 100-101):

> (a) Indians whose "name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906"; or
>
> (b) Indians whose "name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior"; or
>
> (c) Indians who "are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary."

Thus, the Cherokee Delawares (through the first provision), the Absentee Delawares (through the second provision), and the Kansas "Delawares" (through the third, or "catchall," provision) all were eligible to participate in this distribution.

Subsequently, the Absentee and Cherokee Delawares brought a second suit in the Indian Claims Commission for an accounting under the 1854 treaty relating to the sale of the "trust lands." The Commission concluded that these lands had not been sold at public auction, contrary to the terms of the treaty, and awarded the Delawares $9,168,171.13, including interest from 1857 (J.S. App. 19-20). In the Act of October 3, 1972, 86 Stat. 762 *et seq.*, 25 U.S.C. (Supp. IV) 1291-1297, however, Congress adopted a distribution plan for payment of this judgment that differed from the distribution set forth in 25 U.S.C. 1181-1186; ten percent of the award was to be paid directly to the Cherokee and Absentee Delaware Tribes for uses approved by the Secretary, while the remaining ninety percent was to be divided among individuals in categories (a) and (b) above. Thus, since the "catchall" provision (c) was not included in the distribution statute, the Kansas "Delawares" did not share in the second award (J.S. App. 21).

3. Appellants, representatives of a class of descendants of the Kansas "Delawares," instituted this action in the United States District Court for the Western District of Oklahoma against the Secretary of the Interior and the Cherokee and Absentee Delawares to challenge the constitutionality of the distribution statutes, 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297. Specifically, appellants alleged that the inclusion of the Cherokee Delawares in the distribution authorized by 25 U.S.C. 1181 and the inclusion of the Cherokee and Absentee Delawares in the distribution authorized by 25 U.S.C. (Supp. IV) 1292 violated their rights to due process of law and just compensation under the Fifth Amendment by improperly diluting their share of the judgment funds. Appellants further alleged that 25 U.S.C. (Supp. IV) 1292 violated principles of equal protection embodied

in the Due Process Clause of the Fifth Amendment by excluding them from sharing in that distribution.

A three-judge district court rejected appellants' constitutional attack on the inclusion of the Cherokee and Absentee Delawares in the distribution statutes (J.S. App. 5-90; 406 F. Supp. 1309). The court held that Congress could rationally include the Absentee Delawares in the award redressing the breach of the 1854 treaty, despite the fact that the Absentees lived apart from the main tribal body at that time, because the Absentee Delawares were members of the Delaware Tribe in 1854 and were recognized as such (J.S. App. 60-62). The court held in addition that Congress properly allowed the Cherokee Delawares to participate in both distributions because their members are lineal descendants of the tribe injured by the wrongs (J.S. App. 56-59).[3]

ARGUMENT

Appellants contend that 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297 deprive them of property without just compensation and are so irrational that they violate the Due Process Clause of the Fifth Amendment. The district court correctly rejected these arguments on the basis of findings of fact that are amply supported by the record and legal principles that have repeatedly been applied by this and other courts. Appellants have presented no issue warranting plenary consideration by this Court.

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[3]The court, with one judge dissenting, declared 25 U.S.C. (Supp. IV) 1292 unconstitutional insofar as it failed to include appellants, whose ancestors were among the Indians injured by the government's breach of the 1854 treaty, in the class of persons entitled to share in the second distribution. The Cherokee Delawares, the Absentee Delawares and the Secretary have sought review of this portion of the district court's judgment in Nos. 75-1301, 75-1335, and 75-1495.

1. Appellants' claims under the Just Compensation Clause of the Fifth Amendment are insubstantial. Judgments of the Indian Claims Commission are tribal property, since they redress wrongs done to the tribe rather than to individual Indians. See *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307. As with all such property, rights do not vest in individuals until the judgment funds have been distributed. *Minnesota Chippewa Tribe* v. *United States*, 161 Ct. Cl. 258, 270-271, 315 F.2d 906, 913-914; *Cherokee Freedmen* v. *United States*, 195 Ct. Cl. 39, 50-51.

In *United States* v. *Jim*, 409 U.S. 80, for example, Congress passed a statute in 1933 giving Indians living on a portion of the Navajo reservation the benefit of any minerals that might be found on their land. In 1968 Congress enacted new legislation enlarging the class of Indians within the tribe who were entitled to share in the mineral royalities. In upholding the latter statute against the claim that it constituted an unconstitutional taking of property without just compensation, this Court stated (409 U.S. at 82-83):

> It is settled that "[w]hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307; *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127, 136. * * *
>
> Congress had not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the * * * royalties * * * in a more efficient and equitable manner. This was well within the power of Congress to do so. As no "property," in a Fifth Amendment sense, was conferred upon residents of the [reservation] by the 1933

Act, no violation of the Fifth Amendment was effected by the 1968 legislation.

See also *Northern Cheyenne Tribe* v. *Hollowbreast*, No. 75-145, decided May 19, 1976, slip op. 7 ("The Court has consistently recognized the wide-ranging congressional power to alter allotment plans until those plans are executed."); *Sizemore* v. *Brady*, 235 U.S. 441, 449; *Gritts* v. *Fisher*, 224 U.S. 640, 648.

2. Appellants contend that their right to due process of law under the Fifth Amendment was violated by Congress' inclusion of the Cherokee and Absentee Delawares in the distribution of judgment funds for wrongs under the 1854 treaty and by Congress' inclusion of the Cherokee Delawares in the distribution of judgment funds for wrongs under the 1818 treaty.

a. Although appellants apparently do not question that the Absentee Delawares were members of the Delaware Tribe at the time of the breach of the 1854 treaty in 1856 and 1857 (J.S. 9),[4] they assert that tribal membership should not be the determinative factor in the distribution of judgment funds. Instead, appellants refer to several historical facts (J.S. 28), primarily that the Absentees did not reside with the main body of the tribe in Kansas in 1854, to demonstrate that the Absentee Delawares were not "wronged" by the breach of the treaty.

Congress properly concluded, however, that membership in the tribe, as evidenced by tribal determinations at

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[4]Appellants also concede that this case raises no contested issues of material fact (J.S. 23).

or about the time of the wrong, should be the controlling factor in deciding which individuals would share in an award.[5] As this Court stated in *Halbert* v. *United States,* 283 U.S. 753, 762-763:

> The rule is general that, in the absence of provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends on tribal membership and is terminated when the membership is ended.

See also Cohen, *Handbook of Federal Indian Law* 185-186 (1942).

While Indians who sever their tribal relationship and live apart from the tribe therefore lose their right to participate in tribal assets (*Eastern Band of Cherokee Indians* v. *United States,* 117 U.S. 288; *Miami Tribe of Oklahoma* v. *United States,* 150 Ct. Cl. 725, 281 F.2d 202), an Indian group that was physically separated from the main tribal body at the time of a wrong to the tribe may nonetheless share in an award redressing the wrong if it retained tribal membership and was recognized by the tribe as having done so. *Delaware Tribe of Indians* v. *United States,* 130 Ct. Cl. 782, 128 F. Supp. 391. Here, there was substantial evidence to justify Congress' conclusion that, despite their physical separation from the Delaware Tribe, the Absentee Delawares were considered to be members of the tribe in 1856 and 1857. For example, Article IV of the 1860 treaty between the United States and the Delawares provided (12 Stat. 1129, 1130):

> Whereas some years ago a good many of the Delawares went down among the Southern Indians,

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[5]The 1854 treaty refers to the "Delaware tribe of Indians" (10 Stat. 1048, 1049) and the trust fund established in Article 7 of the treaty was made "for the benefit of the Delaware people" (10 Stat. 1050).

> and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return * * * .

Indeed, this precise question was considered in 1955 by the Court of Claims, which concluded after a study of the Delaware tribal relations a century earlier (*Delaware Tribe of Indians* v. *United States, supra,* 130 Ct. Cl. at 796; 128 F. Supp. at 399):

> We think that the rule and policy of the Delawares [in 1854] was and had been to recognize all Delawares everywhere, who had maintained their identity as Delawares, as members of the tribe. If, therefore, the alleged wrong had been actionable at the time it occurred, the absent members of the tribe would have been entitled to share in the recovery.

This factual conclusion does not conflict with this Court's decision in *Eastern Band of Cherokee Indians* v. *United States, supra,* or other decisions on which appellants rely. In *Eastern Band,* the Court found that the Cherokees in North Carolina had dissolved their connection with their tribe when they refused to accompany it on its removal by treaty to lands west of the Mississippi River and that they had become "aliens to their Nation." 117 U.S. at 312.[6] As noted above, the historical record in this case is otherwise. Thus, the district court correctly concluded (J.S. App. 62):

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[6]The Cherokee constitution of 1838 also provided (117 U.S. at 305):

> that whenever any citizen shall remove with his effects out of the limit of this nation and become a citizen of any other government, all his rights and privileges as citizen of this nation shall cease * * *.

> [T]here is support for the position that the Delaware tribe in 1854 recognized the Absentees as members of the tribe. In these circumstances we cannot say the Congress had no rational basis for the inclusion of the Absentees in the provisions for distribution for the award to redress the 1854 wrong.

b. Appellants' claim that the Cherokee Delawares may not participate in the distribution of judgment funds for wrongs committed under the 1818 and 1854 treaties because they are members of the Cherokee Tribe is, as appellants concede (J.S. 32), wholly without legal support. Indeed, this Court has held that the Cherokee Delawares, although now part of the Cherokee Tribe, are entitled to share in the Delaware tribal funds. *Cherokee Nation* v. *Journeycake*, 155 U.S. 196, 213. Congress therefore properly included the Cherokee Delawares in the distribution statutes, regardless of their current tribal membership, because they unquestionably are lineal descendants of members of the injured tribe at the time of the wrongs, and have maintained a group identity as Delawares (J.S. App. 15-16).

3. We submit that the rational basis for Congress' decision to include the Cherokee and Absentee Delawares in the distributions authorized by 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297 is clear. In view of the broad authority of Congress to distribute tribal property in the manner it views as most beneficial to the affected Indians (see, *e.g.*, *Northern Cheyenne Tribe* v. *Hollowbreast*, *supra*; *United States* v. *Jim*, *supra*; *Simmons* v. *Seelatsee*, 384 U.S. 209, affirming, 244 F. Supp. 808 (E.D. Wash.); *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 718; *Winton* v. *Amos*, 255 U.S. 373, 391; *Williams* v. *Johnson*, 239 U.S. 414, 420; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565), the district court correctly sustained the constitutionality of these statutes.

CONCLUSION

The judgment of the district court should be affirmed insofar as it upholds the constitutionality of 25 U.S.C. 1181-1186 and 25 U.S.C. (Supp. IV) 1291-1297.

Respectfully submitted.

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